Information Law: Cases and Materials
Volume One

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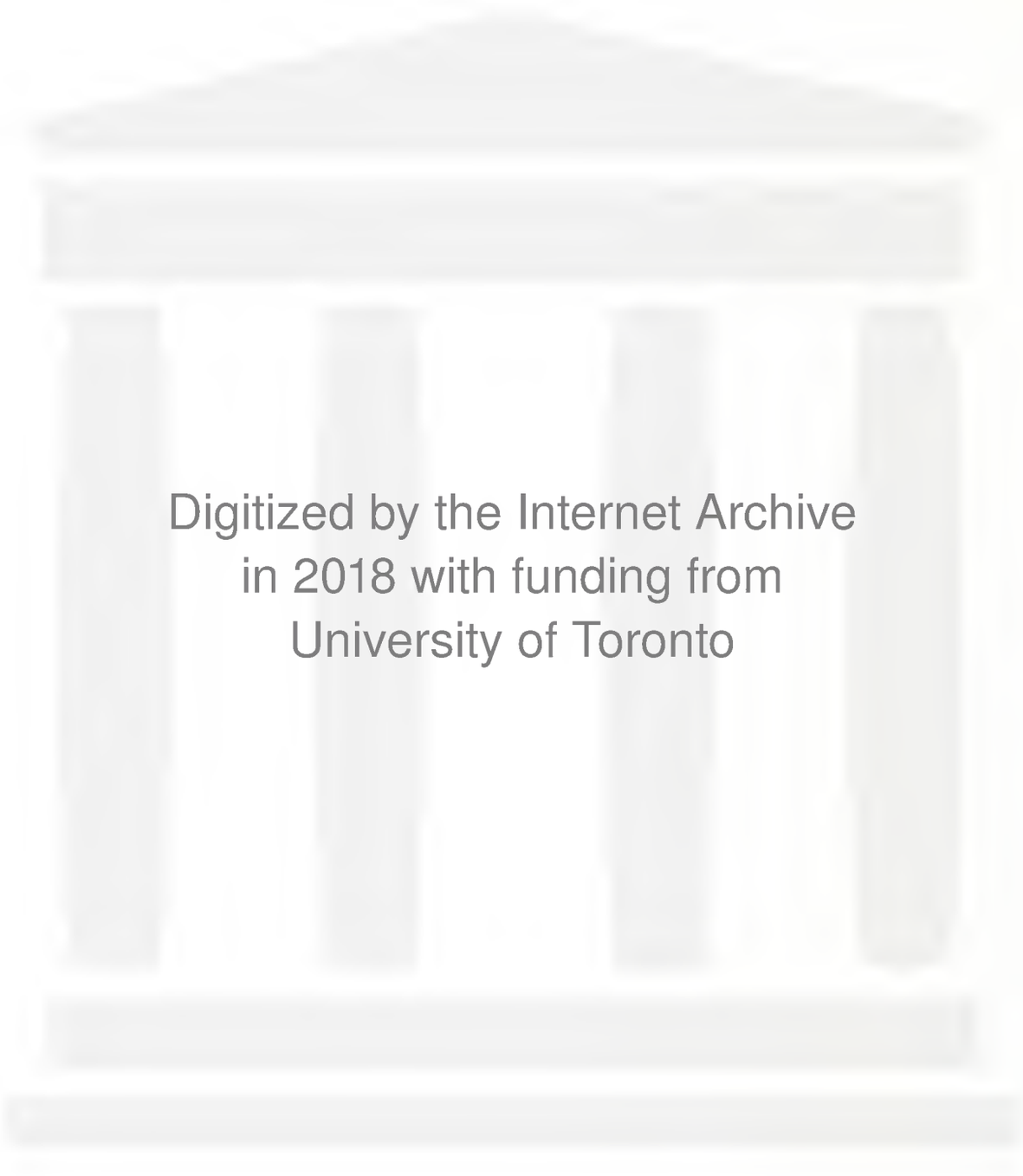

Information Law: Cases and Materials Volume One*
Table of Contents

* Most of the "Notes" in this volume were prepared by Rosslyn Young.

Notes

1) Information and Government Regulation

The Supreme Court of Canada has regularly asserted that information provided to the state as a consequence of the government's role of regulator and administrator attracts a lower level of privacy protection. For example, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425,, La Forest J. stated:

> In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.

2) "Considerable Sympathy": Privacy and Section 7 of the *Charter*

The Supreme Court has examined the place and protection of the right to privacy under Section 7 of the *Charter* in a number of cases. The jurisprudence recognizes that privacy is protected under both the right to liberty and the right security of the person. While the discussion has remained tangential, the court's "considerable sympathy" for its inclusion under s. 7 points to the importance that Canada's highest court has given to privacy under the *Charter*.

In 1988, in *R v Beare*[2], the Supreme Court "expressed sympathy" for the notion that the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" protects a right to privacy. In *Beare*, the accused challenged the police procedure of finger-printing arrested suspects in custody for the committal of a crime as a violation of s. 7. LaForest J., writing for the majority, sympathized with the notion that privacy was protected by s. 7, but pointed to the ruling in *Hunter v Southam*[3], holding that the constitution protects a "*reasonable* expectation" (italics added) of privacy. The majority in *Beare* held that an individual arrested for a serious crime must lose some expectations of personal privacy, including the right to be free of certain physical observations and documentation, such as fingerprinting. While the challenge was unsuccessful, the inclusion of a reasonable expectation of privacy under s. 7 received sympathetic treatment by the court.

Following *Beare* the intersection between privacy and s. 7 arose in *Rodriguez v. British Columbia (Attorney General)*[4]. Both the majority judgment, written by Sopinka J., and L'Hereux-Dube's dissent found that the challenged provision of the *Criminal Code* [s. 241(b)]

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[2] [1988] 2 SCR 87 [hereinafter *Beare*]
[3] [1984] 2 SCR 145
[4] [1993] 3 SCR 519 [hereinafter *Rodriguez*]

prohibiting assisted suicide violated s. 7 of the Charter. The violation lay in the provision's infringement of the right to security of the person. Sopinka J. writes, "There is no question, then, that personal autonomy, at least with respect to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person..." (para. 136). Agreeing on this point, L'Hereux-Dube J. elaborates that security of the person "has an element of personal autonomy, protecting the dignity and privacy of individuals" (para. 200). While the majority and the dissent agree that security of the person incorporates personal autonomy over decisions concerning the privacy and dignity of one's own body, the majority finds that this violation is in accordance with the principles of fundamental justice because the infringement is necessary to prevent homicides masked as assisted suicides. L'Hereux-Dube J. disagrees and argues that the violation is arbitrary and therefore is *not* in accordance with the principles of fundamental justice; however, the point of agreement on the inclusion of the right to make automous and private decisions about the dignity of one's body under security of the person represents an important advancement for *Charter* protection of privacy.

In *R v. O'Connor* [1995] 4 SCR 411, the court addressed the privacy interest that is engaged in the production of medical records in a criminal trial and extended the relationship between privacy and s. 7 to encompass the right to liberty. As with *Rodriguez*, the majority and minority opinions agreed on the inclusion of the right to privacy under s. 7, but disagreed on how this right should be balanced against other societal interests. *O'Connor*, a sexual assault case, concerns the defense's request for the production of reports associated with the complainant's medical and counseling records. LaForest J., writing for the majority, "agree[s] with L'Hereux-Dube J., that a constitutional right to privacy extends to information contained in many third party records". In her dissent, L'Hereux-Dube J. argues that protection for privacy is guaranteed under the right to liberty in s. 7. She writes, "Respect for individual privacy is an essential component of what it means to be 'free'. As a corollary, the infringement of this right undeniably impinges upon an individual's liberty in our free and democratic society". She goes on to argue that "the nature of the private records which are the subject matter of this appeal properly brings them within that rubric" (para. 118). Of course, any rights are absolute and L'Hereux-Dube recognizes that an individual's right to privacy in personal medical records must be balanced against the potential violation of an accused's right to make full answer and defense at trial. While the majority agrees with L'Hereux-Dube J.'s treatment of s. 7 and the right to privacy, it holds that the accused's right to a fair trail is equally valuable and upholds the B.C. Court of Appeal order to produce certain documents. Disagreeing with the majority holding, L'Hereux-Dube J. argues that the individual's right to privacy must be paramount in the determination of how and when private medical records should be produced.

Soon after the *O'Connor* decision, the issue of privacy arose in another s. 7 challenge in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*[5]. The case centered on whether or not the rights of parents of a young child had been violated when the child was made a ward of the state in order to provide a life-saving blood transfusion, which was against the religious beliefs of the parents. The court found that the parents' liberty interest in the right to make important decisions regarding their children was engaged when the state intervened to procure the necessary medical treatment. This liberty interest, writes LaForest J. for the majority, lies in the importance our society attaches to freedom of choice and personal autonomy. Agreeing with Wilson J.'s assertion in *R v. Morgentaler*[6] that the liberty interest of s. 7 encompasses protection for "the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions"

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[5] [1995] 1 SCR 315

[6] [1988] 1SCR 30 [hereinafter *Morgentaler*]

(para. 80, quoting Wilson J.), LaForest J. follows L'Hereux-Dube in *O'Connor* to extend the scope of the liberty interest protected by s. 7 to includc personal autonomy and freedom over private and personal decisions. The ruling goes on to argue that while the state's actions *did* violate the parents' rights to liberty under s. 7, the violation was in accordance with the principles of fundamental justice. In balancing the right to liberty against the state's interest in protecting the child's life and health, the court asserts that the latter should take precedence.

In *M. (A.) v. Ryan*[7], the court was again faced with the issue of the compelled production of personal records held by third parties. While *Ryan* was a civil, rather than a criminal case, the majority upheld the Court of Appeal's ruling to produce certain documents in the interest of the defendant's right to full disclosure within the civil justice system . Writing the dissenting opinion, L'Hereux-Dube J. disagrees. She asserts that the records in question are similar to those at issue in *O'Connor* and thus engage a right to privacy. In her opinion an individual's rights to privacy, which she asserts is "essential to human dignity" (para. 80), should not be superceded by the respondent's right to a fair trial. While recognizing the importance of balancing conflicting interests, the right to privacy in personal records, guaranteed under the s. 7 right to liberty and security of the person requires a more stringent screening process prior to production in order to safeguard the complainant's privacy interest to the highest possible degree.

In the final case where issues concerning privacy were challenged under s. 7, the court was faced with a state-imposed restriction on choice, which infringed an individual's privacy. In *Godbout v. Longueiul (City)*[8], the plaintiff commenced an action for wrongful dismissal. As a former employee of the city, her position was terminated due to a conflict between the municipality's employment requirement of residence within the city-limits and her choice to reside outside the city. The plaintiff argued that the city's actions violated s. 7 of the *Charter*. Drawing on Wilson J's characterization of the liberty right in *Morgentaler* and on the sympathetic treatment for the inclusion of privacy under s. 7 in his judgment in *Beare*, LaForest J., writing for the majority, expressed his view "that the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference" (para. 66). Accordingly, the municipality's regulations regarding residence within city limits imposes restrictions on an individual's freedom to make choices on where to live, which is a matter of personal privacy. The challenge was successful and the plaintiff was re-instated and awarded damages.

The court has included protection for privacy under s. 7 in its treatment of the right to liberty and security of the person. While a direct challenge of a privacy related concern under s. 7 remains to come before the court, given the rising importance of privacy in today's electronic and information age, the Supreme Court will likely be refining its treatment of the relationship in the near future.

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[7] [1997] 1 SCR 157 [hereinafter *Ryan*]
[8] [1997] 3 SCR 315

Notes

1) Video Surveillance by the R.C.M.P. in Kelowna, British Columbia

In early 2001, after consulting with local officials and businesses, the Kelowna detachment of the R.C.M.P. installed video surveillance cameras at an intersection in the city. In addition, signs indicating that surveillance videos were in operation were posted around the intersection. The videotaping ran continuously and was monitored by assistants hired by the R.C.M.P.. The tapes were changed daily and according to policy were stored for six months before being destroyed, unless they were required for an administrative or purpose, in which case they were kept for a longer period of time. Following a complaint to the Privacy Commissioner's office, federal Privacy Commissioner, George Radwanski, investigated and ruled that the continuous video taping of a public place violated privacy rights guaranteed under the *Privacy Act*. His report granted that that security cameras have a place in law enforcement, but Radwanski objected to the continual taping of a public area that is not otherwise sensitive area for security and safety reasons. While conceding that the right to privacy is less in public places than in private homes, he asserts that "...in those public places, we retain the privacy right of being "lost in the crowd," of going about our business without being *systematically* observed or monitored, particularly by the state"[9].

Following the release of the Privacy Commissioner's report, the R.C.M.P. did not remove the surveillance cameras from the intersection, but did stop the continuous recording, thus technically complying with the *Privacy Act*; however, this did not satisfy the Commissioner. He proceeded to launch a challenge under the *Charter of Rights and Freedoms*. The case went before the Supreme Court of British Columbia in March of 2003 and in June of the same year, the court agreed with the Attorney General's submission that the Mr. Radwanski did not have standing to bring the *Charter* challenge before the court in his capacity as Privacy Commissioner. Following Mr. Radwanski's resignation as Commissioner, his newly appointed predecessor, Robert Marleau, announced that the suit and any future appeals were being withdrawn.

The R.C.M.P.'s use of video surveillance in Kelowna is far from an unusual practice. Video surveillance of public places in the interests of security and law enforcement is becoming increasingly common. For example, the use of closed circuit television (CCTV) by law enforcement agents in Washington, D.C. has increased significantly as a response to increases security pressures since September 11th. Organizations and advocacy groups, such as EPIC (Electronic Privacy Information Center) have responded to this increased use of the technology by highlighting concerns that video surveillance presents vis-à-vis privacy rights. Examples include the likelihood and incidence of abuse of video surveillance (predominantly the voyeuristic observation of women by monitors) the chilling effect of monitoring on public events and expression, such as political rallies and concerns over how the video images might be used in combination with other technologies, such as biometrics. Groups such as EPIC, also question the efficacy of video surveillance in preventing crime. To date, video surveillance has not proved successful in the "fight against terrorism" and a study by the Home Office in Britain, where video surveillance technology is more common, found that the "best current evidence suggests that CCTV reduces crime to a small degree. CCTV is most effective in reducing vehicle crime in car parks, but it had little or no effect on public transport or city center settings"[10] While video

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[9] Radwanski, George. "Privacy Commissioner's finding on video surveillance by RCMP in Kelowna". Federal Privacy Commissioner's website: http://www.privcom.gc.ca/cf-dc/02_05_b_011004_e.asp

[10] "Crime Prevention Effects of Closed-Circuit Television: a Systematic Review" Home Office Research Studies (2002). website: http://www.homeoffice.gov.uk/rds/pdfs2/hors252.pdf

surveillance can play a role in increasing public safety and security, privacy advocates suggest that its unquestioned proliferation in pubic spaces raises alarming issues around privacy and civil liberties that should be addressed rather than ignored.

2) Biometrics

When the 2001 Super Bowl was held in a Florida stadium, the football fans and spectators were unknowingly subjected to a post-modern, multi-layered example of the 'observation of the observers'. The crowd was being monitored by biometric, face-recognition software in an attempt by law-enforcement agents to identify known criminals. The response to the use of this technology, provided free to the organizers by the manufacturer, produced strong reactions in civil libertarians and privacy advocates. The American Civil Liberties Union (ACLU) responded by condemning the practice and calling for public hearings into its use. ACLU and other groups expressed concern over the clandestine nature of the surveillance, as well as the potential for error in its application.

Biometrics refer to the "automatic identification or identity verification of living persons using their enduring physical or behavioral characteristics, including finger prints, signatures, retinas, voices and odors"[11] Facial recognition is one type of biometrics, which measures the differences in facial feature construction and compares these measurements against a database of identified faces. For example, at the 2001 Super Bowl, video cameras filmed the crowd and facial images were digitalized into pictures that were then compared against databases of known criminals. While this technology has been lauded for what it offers to security and policing efforts, its use also raises concerns for privacy rights. For example, its interface with databases is one of the major problems identified by privacy advocates. Biometrics requires databases of comparable and identified individuals in order to be effective and this interface increases the likelihood of privacy violations. The use of databases raises privacy issues associated with the security, reliability and authenticity of the information contained in the database. For example, how long will a facial image be stored and how will the personal information that can be linked to that image be secured against misuse?

Another issue raised by biometrics is the possibility of it being linked with other data to identify patterns and reveal personal information about individuals. For example, if used in shopping centers the information could be compiled to form shopping habit profiles for use by private or commercial entities. Yet another problem is the increased use of facial recognition and other forms of biometric surveillance: if biometric surveillance were ever to become ubiquitous (and with the increased use of security cameras in public places, this is not an unreal possibility) the linking of various digitized images could conceivably produce a electronic trail of individuals' movements from place to place, a frightening prospect to say the least.

When facial recognition software was used at the 2002 Super Bowl it produced less of a public outcry due to heightened security concerns in the post 9-11 context; however, it was not used at the 2003 Super Bowl in San Diego. In the two years subsequent to its appearance in Florida, research revealed that the technology was better suited to *confirmation* of identification, as opposed to identification of individuals in a crowd. In addition, the nature of large-scale public events decreases the efficacy of positive identification using the software.

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[11] Abernathy, William and Lee Tien. "Biometrics: Who's Watching You?" Electronic Frontier Foundation website (http://www.eff.org/Privacy/Surveillance//biometrics/)

Despite its less than successful use as a security measure at large-scale public gatherings, facial recognition's use in identity confirmation has made it particularly useful at airports. In Canada, it is used at Toronto's Pearson International airport. While the RCMP assert that it is not applied for general surveillance, the software *is* used to confirm the identity of people who have been detained upon suspicion. Once photographed, suspicious travelers are photographed and that photograph is compared against a database of known terrorists and criminals. While similar privacy concerns are given for biometrics' use in identity confirmation, former federal Privacy Commissioner, George Radwanski, condoned the use of this software by law enforcement agencies, as it is applied at Pearson, as not giving rise to major privacy concerns.

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Notes

1) Government Information Sharing

In its role as regulator and provider of services, the government acquires and uses vast amounts of information about individuals. This raises many questions regarding the conditions under which information gathered in one context may be used in another context. Some of these questions are regulated under the *Privacy Act*, which will be discussed later in the course. However, a number of considerations have emerged out of s.8 jurisprudence.

For example, where the state has acquired information in a non-criminal context, it cannot necessarily use it for the purposes of a criminal prosecution without seeking prior judicial authorization. Thus, in *R. v. Colarusso* [1994] 1 SCR 20, evidence seized by a coronor could not be used by the criminal law enforcement arm of the state without a warrant. In *R. v. Mills* [1999] 3 SCR 668 the Supreme Court affirmed that just because information is in the hands of the Crown, an individual's privacy interest in that information has not been lost: "Privacy is not an all or nothing right ... Where private information is disclosed to individuals outside of those to whom, or for purposes other than for which, it was originally divulged, the person to whom the information pertains may still hold a reasonable expectation of privacy." In the more recent case, *R. v. Law* 2002 SCC 10, the Supreme Court rejected the argument that papers discovered in a stolen safe seized for the purposes of investigating the theft could, without a warrant, be shared with another officer who was investigating the owner of the safe for a different offence. However, a recent trilogy of cases outline situations where information gathered as a direct result of investigating regulatory compliance may be shared with the police without the requirement of a warrant: *R. v. Laroche* 2002 SCC 72, *R. v. Jarvis* 2002 SCC 73, *R. v. Ling* 2002 SCC 74.

2) Data Retention and the State

In *R. v. Arp* [1998] 3 SCR 339, the Supreme Court held that DNA samples taken from the accused for the purposes of a previous investigation could be used for the purposes of a subsequent investigation. Cory J. wrote:

> As Iacobucci J. stated for the majority in Borden, supra, at p. 160, a seizure occurs whenever there is a non-consensual taking by state officials of an item in which the citizen has a reasonable expectation of privacy. See also R. v. Dyment, [1988] 2 S.C.R. 417. Where the police seek to obtain blood or hair samples from a suspect, the expectation of privacy with respect to bodily integrity is clear. Thus, where the police do not possess statutory authority to demand such a sample, it can only be taken with the consent of the suspect.
>
> Iacobucci J. writing for the majority in the Borden case carefully considered the meaning of consent. In that case, two sexual assaults occurred within a few months of each other. The accused was arrested for the second assault. The accused complied with a police request to provide hair and blood samples in connection with the second assault. However, the police hoped to use the blood sample to establish through DNA testing that the accused was the assailant in the first assault. The accused was given virtually no indication that the samples were also being sought in connection with the first assault. The majority held that there is a "link between the scope of a valid consent and the scope of the accused's knowledge in relation to the consequences of that consent" (at p. 163). Iacobucci J. observed that for the waiver to be valid the person purporting to

consent must have sufficient information to give a valid consent. It was put in this way at pp. 162-63:

> In order for a waiver of the right to be secure against an unreasonable seizure to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful. . . .
>
> . . . [There is] a link between the scope of a valid consent and the scope of the accused's knowledge in relation to the consequences of that consent.

He went on to conclude, at pp. 164-65, that:

> It was incumbent on the police, at a minimum, to make it clear to the respondent that they were treating his consent as a blanket consent to the use of the sample in relation to other offences in which he might be a suspect. I express no opinion on the question of whether there would have been a seizure if the intention of the police to use the sample in respect of the [earlier] assault case, and the subsequent appropriation of the sample for that purpose, did not exist until some time after the seizure of the blood for use in the [later] case. . . .
>
> The degree of awareness of the consequences of the waiver of the s. 8 right required of an accused in a given case will depend on its particular facts. Obviously, it will not be necessary for the accused to have a detailed comprehension of every possible outcome of his or her consent. However, his or her understanding should include the fact that the police are also planning to use the product of the seizure in a different investigation from the one for which he or she is detained.

Thus the general principle to be taken from Borden is that the scope of a valid consent may be limited by the extent of the accused's knowledge and the information given to the accused as to the consequences of giving his consent. The majority specifically left open the issue raised by the appellant in this case.

...

Nevertheless decisions of this court make it clear that if consent to the provision of bodily samples is to be valid it must be an informed consent. That is to say persons consenting must be aware of their rights and as far as possible the consequences of their consent. See Borden, supra, at pp. 161-62; and R. v. Mellenthin, [1992] 3 S.C.R. 615, at p. 624. Yet if neither the police nor the consenting person limit the use which may be made of the evidence then, as a general rule no limitation or restriction should be placed on the use of that evidence. As Iacobucci J. explained in Borden, supra, at p. 164, "it will not be necessary for the accused to have a detailed comprehension of every possible outcome of his or her consent" in order for the consent to be valid.

> I agree that the obligation imposed on the police in obtaining a valid consent extends only to the disclosure of those anticipated purposes known to the police at the time the consent was given. ...
>
> In the absence of any limitation placed by the police or the consenting party on the use to be made of the hair sample, there is nothing inherently unfair or illegal about the police retaining evidence obtained in connection with one investigation and using it in connection with a later investigation which was not anticipated by the police at the time the consent was given. The police in this case could not possibly have foreseen that 30 months after they had lawfully obtained the appellant's hair samples, the appellant would again be the suspect in another homicide. Moreover, at the time the samples were taken, the appellant was clearly informed that if the police gathered "any evidence as a result of that hair sample, [it would be used] in court" (emphasis added). Thus it is apparent that the appellant's consent was not limited in any way, nor was it vitiated through a lack of knowledge as to the consequences of that consent. The seizure of his hair samples in 1990 was both lawful and reasonable.
>
> In my view, once the appellant's hair samples were taken by the police with the unconditional and reasonably informed consent of the appellant, he ceased to have any expectation of privacy in them.

3) Data Preservation and Third Parties

Following the Supreme Court decision in *R v. O'Connor*[12], which ruled that records held by third parties could be ordered released if they were sufficiently pertinent to a trial, sexual assault crisis centers were faced with potential violations of their client's privacy. One center responded to their lack of success in preventing the release counseling reports and other records by instituting a shredding policy for notes from cases that had "police involvement" and were likely to be subpoenaed.

In *R v. Carosella*[13], the accused was charged with gross indecency after the complainant sought counseling from a sexual assault crisis center. During the counseling sessions, the complainant was informed that any records or notes from the discussion could be ordered released by a court should she choose to pursue criminal charges and agreed to proceed. When the defense requested the release of the center's notes pertaining to the complainant from the Crown, the center informed the court that these notes no longer existed as they were destroyed pursuant to the center's policy. The accused launched a section 7 challenge under the *Charter* alleging a violation of his right to make full answer and defense. The judge agreed that the missing material was relevant to the trial and that its absence had prejudiced the accused by denying him the chance to effectively cross-examine the complainant. Consequently, a stay of proceedings was ordered. The Court of Appeal overturned the trial judge's ruling and directed the matter to proceed to trial. The accused appealed to the Supreme Court.

Canada's highest court split on the case. The majority, written by Sopinka J. followed the trial judge and reversed the Court of Appeal ruling. The majority held that had the materials not been destroyed, they would have been released to the Crown and following the precedential

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[12] [1995] 4 SCR 411
[13] [1997] 1 SCR 80

threshold set out in *R v Stinchcombe*[14] would have been disclosed to the accused. Holding with the trial judge that the counseling notes were "logically probative" (para 47) to the issue at trial, their absence prevented the accused from making full answer and defense and therefore violated his constitutional rights. Consequently, the court re-instated the trial judge's stay of proceedings.

Writing for the dissent, L'Hereux-Dube agreed with the Court of Appeal's decision. She argues that the case does not involve the issue of disclosure. She writes, "It is crucial to recall....that in the case at bar, the Centre is a third party, a party which is under no obligation to preserve evidence for prosecutions or otherwise" (para 66). She asserts that an accused is not constitutionally entitled to a perfect trial, but only a "fundamentally fair" trial and the presence of every piece of relevant evidence is not only not required but impossible. Turning to a long line of Canadian and American jurisprudence, she asserts that the accused must bear the onus of proving that the absence of a piece of evidence seriously prejudices the potential for a fair trial before a stay of proceedings should be ordered. Agreeing with the Court of Appeal, L'Hereux-Dube asserts that the accused did not prove the relevancy of the documents even to the third party *O'Connor* standard. In short, the destruction of the documents, according to the dissent, does not "undermine the moral integrity of a prosecution" because it does not affect the fairness of the trial. L'Hereux-Dube suggests instead that the centers policy was "designed to protect its clients' privacy and ensure that women would not be dissuaded from seeking assistance for fear that their private discussions will be communicated to the defense" (para. 142).

3) RFID technology

The image of the barcode has become ubiquitous in the retail context and we rarely give a second thought when a cashier scans in a product with a barcode: however, technological advancements are leading to barcodes' likely graduation to the next level of product tracking. Radio frequency identification (RFID) technology has the potential to identify products and the people who buy and use with more sophistication and efficiency and consequently this technology has the potential to interfere with privacy.

RDIF's consist of a small and increasingly inexpensive electronic chip that contains digital information about the product. A portable reader can read the information contained on the chip, which is be imbedded into commercial products, from up to 30 meters away. When an RFID tag passes through the electromagnetic zone, it detects the reader's activation signal. This data is then transferred into the host computer for processing. Currently RDIF's are not widely used, but the advantages they offer over barcodes, including the ability to encode customer-specific data, such as credit card information and to track individual items, as opposed to merely by type, make them an attractive alternative for businesses. RFID's also offer the ability to track an item remotely, as opposed to, which require a close-proximity scan.

Of course, as with many new technologies, RFIDs are not without wider societal issues and concerns. In April of 2003, Benetton, an Italian clothier provoked public outrage in Europe when it announced that it would be using "smart-tags" in their products to identify and track inventory. While Benetton stated that it would offer customers the option to "kill" the chip in the product after purchase, privacy advocates objected to the potential for serious privacy violations that such electronic tracking presented. Following the public response to the announcement, Benetton agreed not to implement RDIF technology, for the meantime; however, as the price of individual chips comes down, widespread use becomes increasingly more likely.

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[14] [1991] 3 SCR 326

One potential problem with RDIF's is their hypothetical use in police investigations. For example, a product containing an RDIF at a crime scene can be traced back to the original purchaser through the information on the chip and corresponding payment records. The laws concerning the use of information contained and available through the use of RDIF technology are uncertain and the issue of what police can and should have access to for the purposes of investigation is also an unanswered question. Given the likelihood of RDIF's eventually replacing barcodes in the retail context, law and policy makers will increasingly need to address the problematic privacy issues created by such technology.

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B. Freedom of Expression

Introduction

R. v. Keegstra, [1990] 3 S.C.R. 697

The judgment of Dickson C.J. and Wilson, L'Heureux-Dubé and Gonthier was delivered by –

¶ 1 **DICKSON C.J.**:— This appeal was heard in conjunction with the appeals in R. v. Andrews, [1990] 3 S.C.R. 870, and Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892. Along with Andrews it raises a delicate and highly controversial issue as to the constitutional validity of s. 319(2) of the Criminal Code, R.S.C., 1985, c. C-46, a legislative provision which prohibits the wilful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion or ethnic origin. In particular, the Court must decide whether this section infringes the guarantee of freedom of expression found in s. 2(b) of the Canadian Charter of Rights and Freedoms in a manner that cannot be justified under s. 1 of the Charter. A secondary issue arises as to whether the presumption of innocence protected in the Charter's s. 11(d) is unjustifiably breached by reason of s. 319(3)(a) of the Code, which affords a defence of "truth" to the wilful promotion of hatred, but only where the accused proves the truth of the communicated statements on the balance of probabilities.

I. Facts

¶ 2 Mr. James Keegstra was a high school teacher in Eckville, Alberta from the early 1970s until his dismissal in 1982. In 1984 Mr. Keegstra was charged under s. 319(2) (then s. 281.2(2)) of the Criminal Code with unlawfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students. He was convicted by a jury in a trial before McKenzie J. of the Alberta Court of Queen's Bench.

¶ 3 Mr. Keegstra's teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as "treacherous", "subversive", "sadistic", "money-loving", "power hungry" and "child killers". He taught his classes that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews "created the Holocaust to gain sympathy" and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil. Mr. Keegstra expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered.

¶ 4 Prior to his trial, Mr. Keegstra applied to the Court of Queen's Bench in Alberta for an order quashing the charge on a number of grounds, the primary one being that s. 319(2) of the Criminal Code unjustifiably infringed his freedom of expression as guaranteed by s. 2(b) of the Charter. Among the other grounds of appeal was the allegation that the defence of truth found in s. 319(3)(a) of the Code violates the Charter's presumption of innocence. The application was dismissed by Quigley J., and Mr. Keegstra was thereafter tried and convicted. He then appealed his conviction to the Alberta Court of Appeal, raising the same Charter issues. The Court of Appeal unanimously accepted his argument, and it is from this judgment that the Crown appeals.

¶ 5 The Attorneys General of Canada, Quebec, Ontario, Manitoba and New Brunswick, the Canadian Jewish Congress, Interamicus, the League for Human Rights of B'nai Brith, Canada, and the Women's Legal Education and Action Fund (L.E.A.F.) have intervened in this appeal in support of the Crown. The Canadian Civil Liberties Association has intervened in support of striking down the impugned legislation.

II. Issues

¶ 6 The following constitutional questions were stated on August 1, 1989:

1. Is s. 281.2(2) of the Criminal Code of Canada, R.S.C. 1970, c. C-34 (now s. 319(2) of the Criminal Code of Canada, R.S.C., 1985, c. C-46) an infringement of freedom of expression as guaranteed under s. 2(b) of the Canadian Charter of Rights and Freedoms?

2. If s. 281.2(2) of the Criminal Code of Canada, R.S.C. 1970, c. C-34 (now s. 319(2) of the Criminal Code of Canada, R.S.C., 1985, c. C-46) is an infringement of s. 2(b) of the Canadian Charter of Rights and Freedoms, can it be upheld under s. 1 of the Canadian Charter of Rights and Freedoms as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

3. Is s. 281.2(3)(a) of the Criminal Code of Canada, R.S.C. 1970, c. C-34 (now s. 319(3)(a) of the Criminal Code of Canada, R.S.C., 1985, c. C-46) an infringement of the right to be presumed innocent, as guaranteed under s. 11(d) of the Canadian Charter of Rights and Freedoms?

4. If s. 281.2(3)(a) of the Criminal Code of Canada, R.S.C. 1970, c. C-34 (now s. 319(3)(a) of the Criminal Code of Canada, R.S.C., 1985, c. C-46) is an infringement of s. 11(d) of the Canadian Charter of Rights and Freedoms, can it be upheld under s. 1 of the Canadian Charter of Rights and Freedoms as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

III. Relevant Statutory and Constitutional Provisions

¶ 7 The relevant legislative and Charter provisions are set out below:

Criminal Code

319... .

> (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

Notes:

1) *Ashcroft v. American Civil Liberties Union* 122 S. Ct. 1700 US 2002

After the decision in Reno, Congress enacted the Child Online Protection Act, which prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." Such harmful material is defined as

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Instead of applying to all communication over the internet, COPA's coverage is limited to material displayed on the WWW for commercial purposes. Further, it only prohibits "material that is harmful to minors." Under the Act, it is an affirmative defense that an individual "in good faith, has restricted access by minors to material that is harmful to minors--(A) by requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology."

Prior to COPA going into effect, its constitutionality was challenged by several parties whose Web sites contain "resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines." A preliminary injunction was granted, preventing the enforcement of COPA. This injunction was upheld by the United States Court of Appeals for the Third Circuit on the basis that the use of "contemporary community standards" to identify "material that is harmful to minors" rendered the statute overbroad. Because "Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users" it would catch "any material that might be deemed harmful by the most puritan of communities in any state."

The United States Supreme Court granted certiorari on the question of the use of community standards. Justice Thomas, for the court, held:

The scope of our decision today is quite limited. We hold only that COPA's reliance on community standards to identify "material that is harmful to minors" does not by itself render the statute substantially overbroad for purposes of the First Amendment. We do not express any view as to whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is completed below. While respondents urge us to resolve these questions at this time, prudence dictates allowing the Court of Appeals to first examine these difficult issues.

Petitioner does not ask us to vacate the preliminary injunction entered by the District Court, and in any event, we could not do so without addressing matters yet to be considered by the Court of Appeals. As a result, the Government remains enjoined from enforcing COPA absent further action by the Court of Appeals or the District Court.

For the foregoing reasons, we vacate the judgment of the Court of Appeals and remand the case for further proceedings.

On remand, the Court of Appeals, Garth, Circuit Judge, held that: (1) plaintiffs established substantial likelihood of prevailing on claim that COPA was not narrowly tailored to achieve the Government's compelling interest and therefore failed strict scrutiny test under First Amendment, and (2) plaintiffs established substantial likelihood of prevailing on claim that COPA was unconstitutionally overbroad (*American Civil Liberties Union v. Ashcroft* 322 F. 3d 240 C.A.3 (Pa.) 2003). Certiorari has been granted.

2) *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme* 169 F.Supp.2d 1181 N.D.Cal.,2001.

A California Internet Service Provider sought a court declaration that a French court order was unenforceable in the United States. The order required the ISP to block access by French Citizens to a U.S.-based site that offered Nazi memorabilia for sale. In granting this declaration, the court outlined the controversy in the following terms:

> Defendants La Ligue Contre Le Racisme Et l'Antisemitisme ("LICRA") and L'Union Des Etudiants Juifs De France, citizens of France, are non-profit organizations dedicated to eliminating anti-Semitism. Plaintiff Yahoo!, Inc. ("Yahoo!") is a corporation organized under the laws of Delaware with its principal place of business in Santa Clara, California. Yahoo! is an Internet service provider that operates various Internet websites and services that any computer user can access at the Uniform Resource Locator ("URL") http://www.yahoo.com. Yahoo! services ending in the suffix, ".com," without an associated country code as a prefix or extension (collectively, "Yahoo!'s U.S. Services") use the English language and target users who are residents of, utilize servers based in and operate under the laws of the United States. Yahoo! subsidiary corporations operate regional Yahoo! sites and services in twenty other nations, including, for example, Yahoo! France, Yahoo! India, and Yahoo! Spain. Each of these regional web sites contains the host nation's unique two- letter code as either a prefix or a suffix in its URL (e.g., Yahoo! France is found at http://www.yahoo.fr and Yahoo! Korea at http://www.yahoo.kr). Yahoo!'s regional sites use the local region's primary language, target the local citizenry, and operate under local laws.
>
> Yahoo! provides a variety of means by which people from all over the world can communicate and interact with one another over the Internet. Examples include an Internet search engine, e-mail, an automated auction site, personal web page hostings, shopping services, chat rooms, and a listing of clubs that individuals can create or join. Any computer user with Internet access is able to post materials on many of these Yahoo! sites, which in turn are instantly accessible by anyone who logs on to Yahoo!'s Internet sites. As relevant here, Yahoo!'s auction site allows anyone to post an item for sale and solicit bids from any computer user from around the globe. Yahoo! records when a posting is made and after the requisite time period lapses sends an e- mail notification to the highest bidder and seller with their respective contact information. Yahoo! is never a

party to a transaction, and the buyer and seller are responsible for arranging privately for payment and shipment of goods. Yahoo! monitors the transaction through limited regulation by prohibiting particular items from being sold (such as stolen goods, body parts, prescription and illegal drugs, weapons, and goods violating U.S. copyright laws or the Iranian and Cuban embargos) and by providing a rating system through which buyers and sellers have their transactional behavior evaluated for the benefit of future consumers. Yahoo! informs auction sellers that they must comply with Yahoo!'s policies and may not offer items to buyers in jurisdictions in which the sale of such item violates the jurisdiction's applicable laws. Yahoo! does not actively regulate the content of each posting, and individuals are able to post, and have in fact posted, highly offensive matter, including Nazi-related propaganda and Third Reich memorabilia, on Yahoo!'s auction sites.

On or about April 5, 2000, LICRA sent a "cease and desist" letter to Yahoo!'s Santa Clara headquarters informing Yahoo! that the sale of Nazi and Third Reich related goods through its auction services violates French law. LICRA threatened to take legal action unless Yahoo! took steps to prevent such sales within eight days. Defendants subsequently utilized the United States Marshal's Office to serve Yahoo! with process in California and filed a civil complaint against Yahoo! in the Tribunal de Grande Instance de Paris (the "French Court").

The French Court found that approximately 1,000 Nazi and Third Reich related objects, including Adolf Hitler's Mein Kampf, The Protocol of the Elders of Zion (an infamous anti-Semitic report produced by the Czarist secret police in the early 1900's), and purported "evidence" that the gas chambers of the Holocaust did not exist were being offered for sale on Yahoo.com's auction site. Because any French citizen is able to access these materials on Yahoo.com directly or through a link on Yahoo.fr, the French Court concluded that the Yahoo.com auction site violates Section R645-1 of the French Criminal Code, which prohibits exhibition of Nazi propaganda and artifacts for sale.On May 20, 2000, the French Court entered an order requiring Yahoo! to (1) eliminate French citizens' access to any material on the Yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, and flags; (2) eliminate French citizens' access to web pages on Yahoo.com displaying text, extracts, or quotations from Mein Kampf and Protocol of the Elders of Zion; (3) post a warning to French citizens on Yahoo.fr that any search through Yahoo.com may lead to sites containing material prohibited by Section R645-1 of the French Criminal Code, and that such viewing of the prohibited material may result in legal action against the Internet user; (4) remove from all browser directories accessible in the French Republic index headings entitled "negationists" and from all hypertext links the equation of "negationists" under the heading "Holocaust." The order subjects Yahoo! to a penalty of 100,000 Euros for each day that it fails to comply with the order. The order concludes:
We order the Company YAHOO! Inc. to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes.
High Court of Paris, May 22, 2000, Interim Court Order No. 00/05308, 00/05309 (translation attested accurate by Isabelle Camus, February 16, 2001). The French Court set a return date in July 2000 for Yahoo! to demonstrate its compliance with the order. Yahoo! asked the French Court to reconsider the terms of the order, claiming that although it easily could post the required warning on Yahoo.fr, compliance with the order's requirements with respect to Yahoo.com was technologically impossible. The

French Court sought expert opinion on the matter and on November 20, 2000 "reaffirmed" its order of May 22. The French Court ordered Yahoo! to comply with the May 22 order within three (3) months or face a penalty of 100,000 Francs (approximately U.S. $13,300) for each day of non- compliance. The French Court also provided that penalties assessed against Yahoo! Inc. may not be collected from Yahoo! France. Defendants again utilized the United States Marshal's Office to serve Yahoo! in California with the French Order.

Yahoo! subsequently posted the required warning and prohibited postings in violation of Section R645-1 of the French Criminal Code from appearing on Yahoo.fr. Yahoo! also amended the auction policy of Yahoo.com to prohibit individuals from auctioning:
Any item that promotes, glorifies, or is directly associated with groups or individuals known principally for hateful or violent positions or acts, such as Nazis or the Ku Klux Klan. Official government-issue stamps and coins are not prohibited under this policy. Expressive media, such as books and films, may be subject to more permissive standards as determined by Yahoo! in its sole discretion. Yahoo Auction Guidelines (visited Oct. 23, 2001) <http:// user.auctions.Yahoo.com/ html/guidelines.html>. Notwithstanding these actions, the Yahoo.com auction site still offers certain items for sale (such as stamps, coins, and a copy of Mein Kampf) which appear to violate the French Order. While Yahoo! has removed the Protocol of the Elders of Zion from its auction site, it has not prevented access to numerous other sites which reasonably "may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."
Yahoo! claims that because it lacks the technology to block French citizens from accessing the Yahoo.com auction site to view materials which violate the French *1186 Order or from accessing other Nazi-based content of websites on Yahoo.com, it cannot comply with the French order without banning Nazi-related material from Yahoo.com altogether. Yahoo! contends that such a ban would infringe impermissibly upon its rights under the First Amendment to the United States Constitution. Accordingly, Yahoo! filed a complaint in this Court seeking a declaratory judgment that the French Court's orders are neither cognizable nor enforceable under the laws of the United States.

Defendants immediately moved to dismiss on the basis that this Court lacks personal jurisdiction over them. That motion was denied. Defendants' request that the Court certify its jurisdictional determination for interlocutory appeal was denied without prejudice pending the outcome of Yahoo!'s motion for summary judgment.

II. OVERVIEW

As this Court and others have observed, the instant case presents novel and important issues arising from the global reach of the Internet. Indeed, the specific facts of this case implicate issues of policy, politics, and culture that are beyond the purview of one nation's judiciary. Thus it is critical that the Court define at the outset what is and is not at stake in the present proceeding.
This case is not about the moral acceptability of promoting the symbols or propaganda of Nazism. Most would agree that such acts are profoundly offensive. By any reasonable standard of morality, the Nazis were responsible for one of the worst displays of inhumanity in recorded history. This Court is acutely mindful of the emotional pain reminders of the Nazi era cause to Holocaust survivors and deeply respectful of the motivations of the French Republic in enacting the underlying statutes and of the defendant organizations in seeking relief under those statutes. Vigilance is the key to preventing atrocities such as the Holocaust from occurring again.

> Nor is this case about the right of France or any other nation to determine its own law and social policies. A basic function of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders. In this instance, as a nation whose citizens suffered the effects of Nazism in ways that are incomprehensible to most Americans, France clearly has the right to enact and enforce laws such as those relied upon by the French Court here.
>
> What is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press. If the government or another party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! or another U.S.-based Internet service provider, what principles should guide the court's analysis?
>
> The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.

In reaching its conclusion, the court argued that the French court order could not be enforced in the United States in a manner consistent with the First Amendment (references removed):

> The French order prohibits the sale or display of items based on their association with a particular political organization and bans the display of websites based on the authors' viewpoint with respect to the Holocaust and anti-Semitism. A United States court constitutionally could not make such an order. ... The First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent a compelling governmental interest, such as averting a clear and present danger of imminent violence. ... In addition, the French Court's mandate that Yahoo! "take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes" is far too general and imprecise to survive the strict scrutiny required by the First Amendment. The phrase, "and any other site or service that may be construed as an apology for Nazism or a contesting of Nazi crimes" fails to provide Yahoo! with a sufficiently definite warning as to what is proscribed. ...Phrases such as "all necessary measures" and "render impossible" instruct Yahoo! to undertake efforts that will impermissibly chill and perhaps even censor protected speech.

The court also argued:

> As discussed previously, the French order's content and viewpoint-based regulation of the web pages and auction site on Yahoo.com, while entitled to great deference as an articulation of French law, clearly would be inconsistent with the First Amendment if mandated by a court in the United States. What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time. Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.

Notes

1) Florida Star

In *The Florida Star v. B.J.F.* 109 S.Ct. 2603 1989, a rape victim sued a newspaper for publishing her name contrary to a Florida statute that made it unlawful to "print, publish, or broadcast ... in any instrument of mass communication" the name of a victim of a sexual offence. The United States Supreme Court held that the imposition of damages on the newspaper violated the First Amendment. The Court's reasons included that the newspaper has lawfully obtained the information, the information was truthful and involved a matter of public significance and that the government could take means to safeguard the information other than punishing publication. The Court also found the statute in question to be underinclusive because it only applied to "mass communication." "An individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers."

Justice White (Chief Justice Rehnquist and Justice O'Connor joining) dissented. In his reasons, he argued:

> At issue in this case is whether there is any information about people, which--though true--may not be published in the press. By holding that only "a state interest of the highest order" permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's invitation ... to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts. .... Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here. If the First Amendment prohibits wholly private persons from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers or broadcast on television.
>
> Of course, the right to privacy is not absolute. Even the article widely relied upon in cases vindicating privacy rights, Warren & Brandeis, The Right to Privacy, 4 Harv.L.Rev. 193 (1890), recognized that this right inevitably conflicts with the public's right to know about matters of general concern--and that sometimes, the latter must trump the former. *Id.,* at 214-215. Resolving this conflict is a difficult matter, and I fault the Court not for attempting to strike an appropriate balance between the two, but rather, fault it for according too little weight to B.J.F.'s side of equation, and too much on the other. I would strike the balance rather differently. Writing for the Ninth Circuit, Judge Merrill put this view eloquently:
>
> > "Does the spirit of the Bill of Rights require that individuals be free to pry into the unnewsworthy private affairs of their fellowmen? In our view it does not. In our view, fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable. The public's right to know is, then, subject to reasonable limitations so far as concerns the private facts of its individual members." *Virgil v. Time, Inc.,* 527 F.2d 1122, 1128 (1975), cert. denied, 425 U.S. 998, 96 S.Ct. 2215, 48 L.Ed.2d 823 (1976).

2) Electronic Access to Court Records

The Judges Technology Advisory Council of the Canadian Judicial Council recently released a discussion paper on the topic of electronic access to court records: Open Courts, Electronic Access to Court Records, and Privacy. The JTAC concluded that Canadian jurisprudence establishes that "the right of the public to open courts is an important constitutional rule, that the right of an individual to privacy is a fundamental value, and that the right to open courts generally outweighs the right to privacy." However, it argued that many policy and logistical issues must be resolved to accommodate the electronic filing and retrieval of court records and docket information. One of these issues is the difference between a paper-based environment and an electronic one. The JTAC argued:

> There are at least two options. The first is to establish the same policies and presumptions of openness in the paper and the electronic environments. Proponents argue that there is no justification for restricting access to court records and docket information in the electronic medium. Indeed, those who support this position assert that by gaining access to court records and docket information, not only will practical obscurity disappear but meaningful access will finally be provided. Technical capacity will create equality of access. Furthermore, if the standard is different between paper and electronic access, and if, realistically it will take years for all court records and docket information to be converted to electronic form and in the meantime, courts are likely to operate with historic files in paper form and current files in electronic form, the prospects for inconsistent treatment are pronounced. Staff will have to be trained on two systems of access. The greater the disparity, the more likely there will be errors. Training costs and error rates can be reduced if there is a consistent approach.
>
> The second option is to maintain different policies depending on the medium in which the court records and docket information is available. Proponents argue that access to compiled computerized information is fundamentally different than what is available in the paper world, that simply because it is capable of being provided does not mean it ought to be provided, that ready accessibility (particularly to commercial users) will be inconsistent with the purposes for which the court records were provided, that practical obscurity ought not to be altered, and that enhanced accessibility may discourage litigants from recourse to the courts because of the risk of identity theft and the increased prospects of publicity.
>
> Those who advocate consistency in access yet recognize that the demise of practical obscurity may create opportunities which ought to be discouraged, have argued that the negative aspects of consistency of access in the paper and the electronic environments can be compensated in various ways to which reference will be made below (no bulk searches, tracking identity of searcher, access on site only).

Public Forums

Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139